A **TJM SDN BHD v. MUHAMAD ZAMREE SULAIMAN & ORS**

HIGH COURT MALAYA, IPOH
MOHD RADZI HARUN JC
[ORIGINATING SUMMONS NO: AA-24NCVC-1-01-2018]
31 DECEMBER 2018

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CIVIL PROCEDURE: *Striking out – Grounds for – Seizure of vehicle by Customs officer pursuant to s. 114 of Customs Act 1967 – Originating summons ('OS') for declaration that seizure was null and void – Whether filing of OS time barred – Whether OS filed within time provided under s. 2(a) of Public Authorities Protection*
C *Act 1948 – Whether claim obviously unsustainable – Whether OS scandalous, frivolous or vexatious and abuse of court process – Rules of Court 2012, O. 18 r. 19(1)(b) & (d)*

CUSTOMS AND EXCISE: *Seizure – Seizure of vehicle – Seizure by Customs*
D *officer pursuant to s. 114 of Customs Act 1967 – Originating summons ('OS') for declaration that seizure was null and void – Whether OS filed within time provided under s. 2(a) of Public Authorities Protection Act 1948 – Whether OS obviously unsustainable – Whether OS scandalous, frivolous or vexatious and an abuse of court process – Rules of Court 2012, O. 18 r. 19(1)(b) & (d)*

E The applicant was the owner of a Bentley car ('the car'), which was seized *vide* a notice of seizure dated 8 January 2014 issued by the first respondent, the officer of Customs, pursuant to s. 114 of the Customs Act 1967 ('the Act'). On 3 April 2014, the car was forfeited *vide* a notice of forfeiture, which was also issued by the first respondent, pursuant to s. 128 of the Act. The
F respondents contended that the car was forfeited as it was parked at a place which was not a warehouse and without the Customs' authorisation, in contravention of s. 66(2) of the Act. The applicant had taken various attempts which included its letters, dated 14 April 2014, 20 May 2016, 25 May 2016, 1 September 2016 and 10 October 2017, to the respondents to request for the said car to be returned. As there was no reply from the respondents, the
G applicant filed an originating summons ('OS') against the respondents seeking, *inter alia*: (i) a declaration that the seizure of the car was null and void and *ultra vires* the provisions of the Act; (ii) that the car and the keys to the car should be returned to the applicant; and (iii) special, general and exemplary damages. Hence, the respondents filed the application in encl. 6
H pursuant to O. 18 r. 19(1) (b) and (d), and O. 92 r. 4 of the Rules of Court 2012 ('ROC'), *inter alia*, to strike out the applicant's OS. The respondent's main argument in support of their application was that the cause of action arose on the date when the first respondent issued the notice of seizure and pursuant to s. 2(a) of the Public Authorities Protection Act 1948 ('PAPA'),
I the OS should be filed within 36 months from 8 January 2014, the last date being 7 January 2017. The respondents thus contended that the OS, filed on 2 January 2018, was time-barred and, therefore, must be struck out. On the other hand, the applicant argued that it had communicated in writing with the respondents on numerous occasions. The applicant contended that the

36-month period to file its action against the respondents should be calculated commencing from the date when the applicant made its final attempt with the respondents, *ie*, its letter dated 10 October 2017, and not the date of the notice of seizure. Thus, the 36 months would lapse on 9 October 2020 and its OS filed on 2 January 2018, was within the time permitted under s. 2(a) of the PAPA. The substantive ground of the respondents' application to be considered by the court was whether the applicant's claim was barred under s. 2(a) of the PAPA.

Held (dismissing encl. 6 with no order as to costs):

(1) The time period mentioned in s. 2(a) of the PAPA is absolute and shall be complied with mandatorily. Although the seizure date was 8 January 2014, the date of the notice of seizure was 3 April 2014. The court could not fathom as to how the appellant could be expected to respond within one month from the date of seizure when the notice was issued almost three months after the seizure. The first respondent also failed to delete the relevant portion in the notice of seizure for the court to conclusively make a finding whether the notice was served personally or *via* AR registered post. Further, there was no explanation given as to why the notice of forfeiture was left undated. (paras 9 & 17-20)

(2) Based on the communications between the applicant and the respondents, the applicant's cause of action against the respondent began on 10 October 2017. Therefore, the OS was filed within the time period provided in s. 2(a) of the PAPA. (paras 24 & 25)

(3) Where a claim or pleading is shown to be obviously unsustainable, any limb of O. 18 r. 19(1) of the ROC may be invoked to strike out the claim. Recourse to the summary process can only be adopted when it can clearly be seen that the claim is, on the face of it, obviously unsustainable. There was nothing to show that the applicant's OS was scandalous, frivolous or vexatious and not an iota of abuse of the process of the court in the applicant's action. In the circumstances, the respondents' claims under O. 18 r. 19(1)(b) and (d) of the ROC failed to stand in law. (paras 26, 27 31, 34 & 37)

Case(s) referred to:

Abdul Hamid Rahmat & Anor v. Development & Commercial Bank Bhd & Anor [1993] 1 CLJ 35 HC ***(refd)***

AIC Dotcom Sdn Bhd v. MTEX Corp Sdn Bhd & Ors [2003] 7 CLJ 149 HC ***(refd)***

Alliance Investment Bank Sdn Bhd v. Good Quantum Sdn Bhd & Ors [2011] 4 CLJ 861 HC ***(refd)***

Alias Ismail v. Hairuddin Mohamad & Anor [1997] 4 CLJ 669 CA ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Boey Oi Leng v. Trans Resources Corporation Sdn Bhd [2002] 1 CLJ 405 HC ***(refd)***

Cepatwawasan Group Bhd & Anor v. Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors [2008] 2 CLJ 620 HC ***(refd)***

Credit Corp (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC ***(refd)***

Datuk Ooi Han Eng v. Soh Huah Siah [2010] 1 LNS 343 CA ***(refd)***
Duta Arif Sdn Bhd & Ors v. Charterfield Development Corporation [2007] 1 LNS 415 HC ***(refd)***
Enersafe Sdn Bhd v. Megarina Sdn Bhd [2006] 2 CLJ 1021 CA ***(refd)***
EON Bank Bhd v. Cepad Group Sdn Bhd & Ors (No 2) [2006] 1 LNS 246 HC ***(refd)***
Farlim Properties Sdn Bhd v. Goh Keat Poh & Ors & Other Appeals [2003] 4 CLJ 505 CA ***(refd)***
Godrej Sara Lee Ltd v. Siah Teong Teck & Anor (No 1) [2007] 1 LNS 228 HC ***(refd)***
Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd [2011] 1 CLJ 285 CA ***(refd)***
Hi-Summit Construction Sdn Bhd v. Konsortium Lapangan Terjaya Sdn Bhd & Ors [2014] 1 LNS 999 CA ***(refd)***
Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd [2012] 10 CLJ 88 CA ***(refd)***
Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor [2008] 1 CLJ 651 CA ***(refd)***
Jamir Hassan Najir Hassan v. Kang Min [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773 HC ***(refd)***
Lim Eng Heng v. Lim Sam Keow & Ors [2003] 6 CLJ 1 HC ***(refd)***
Meeriam Rosaline Edward Paul & Ors v. William Singam Raja Singam [2010] 1 LNS 2032 CA ***(refd)***
Mohd Habibullah Mahmood v. Faridah Dato' Talib [1993] 1 CLJ 264 SC ***(refd)***
Nescajaya Sdn Bhd v. Suairah Parigula & Ors [2011] 1 LNS 527 HC ***(refd)***
Ng Yik Seng & Anor v. Perwira Habib Bank Malaysia Bhd [1980] 1 LNS 52 FC ***(refd)***
Noor Jahan Abdul Wahab v. Md Yusoff Amanshah & Anor [1994] 2 CLJ 249 HC ***(refd)***
Public Finance Bhd v. S Ramasamy KMS Chockalingam Chettiar [1990] 2 CLJ 431; [1990] 2 CLJ (Rep) 664 HC ***(refd)***
Sarjit Singh Khaira v. Government of The State of Sarawak & Anor [1990] 2 CLJ 95; [1990] 3 CLJ (Rep) 59 HC ***(refd)***
See Thong & Anor v. Saw Beng Chong [2012] 1 LNS 817 CA ***(refd)***
Selvaraju Ponniah v. Suruhanjaya Perkhidmatan Awam Malaysia & Anor [2007] 6 CLJ 245 FC ***(refd)***
Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2013] 6 CLJ 673 FC ***(refd)***
Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan UMNO Negeri Pahang Darul Makmur [2009] 1 LNS 1457 HC ***(refd)***
Sim Kiang Chiok v. Southeast Asia Special Asset Management Bhd [2015] 9 CLJ 344 CA ***(refd)***
Sivakumar Varatharaju Naidu v. Ganesan Retanam [2010] 9 CLJ 825 CA ***(refd)***
Tasja Sdn Bhd v. Golden Approach Sdn Bhd [2011] 3 CLJ 751 FC ***(refd)***
Wesma Rubber Products v. CIMB Bank Berhad [2014] 1 LNS 479 CA ***(refd)***
Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah [1979] 1 LNS 130 FC ***(refd)***
Zaina Abidin Hamid & Ors v. Kerajaan Malaysia & Ors [2009] 6 CLJ 683 CA ***(refd)***

Legislation referred to:
Customs Act 1967, ss. 66(2), 102, 114, 126, 128(3)
Public Authorities Protection Act 1948, s. 2(a)
Rules of Court 2012, O. 18 r. 19(1)(b), (d), O. 92 r. 4

For the applicant - Mohd Hamizi Mohd Yusof; M/s Raziyan Rahim & Assocs
For the respondents - Fatin Hanum Abdul Hadi; SFC

Reported by S Barathi

JUDGMENT

Mohd Radzi Harun JC:

The Application

[1] The application in encl. 6 was filed by the respondents pursuant to O. 18 r. 19(1)(b) and (d), and O. 92 r. 4 of the Rules of Court 2012 ("ROC"), seeking this court, *inter alia*, to strike out the applicant's originating summons ("OS") dated 2 January 2018.

[2] The respondents' main argument supporting their application is that the applicant cannot proceed with its OS as it is time-barred pursuant to s. 2(a) of the Public Authorities Protection Act 1948 ("PAPA").

[3] Consequentially, the OS must be struck out pursuant to the stated provisions of the ROC.

Background

[4] A brief background facts on the matter are as follows:

(i) The applicant, a company registered under the Companies Act 1965, is the owner of a Bentley car, which was seized *vide* a notice of seizure dated 8 January 2014 issued by the first respondent pursuant to s. 114 of the Customs Act 1967;

(ii) On 3 April 2014, the said Bentley car was forfeited *vide* a notice of forfeiture, which was also issued by the first respondent, pursuant to s. 128 of the same Act;

(iii) The first respondent was, at the material time, the Officer of Customs at the Royal Malaysia Customs Enforcement Branch, Teluk Intan, Perak;

(iv) The respondents contended that the said car was forfeited as it was parked at a place which was not a warehouse and without the customs' authorisation, in contravention of s. 66(2) of the said Customs Act;

(v) It is the applicant's contention that it had taken various oral and written attempts to request for the said car to be returned but to no avail;

(vi) These attempts, the applicant pleaded, include its letters to the respondents dated 14 April 2014, 20 May 2016, 25 May 2016, 1 September 2016 and 10 October 2017; and

(vii) As the Applicant's efforts failed, it then filed the OS against the respondents seeking, *inter alia*, for the following:

(a) a declaration that the seizure of the said car was null and void and *ultra vires* the provisions of the Customs Act 1967;

A (b) that the said car and the keys to the said car shall be returned to the applicant; and

(c) special, general and exemplary damages to be awarded to the applicant.

B **The Application**

[5] The respondents' current application before this court was premised on the following four grounds:

(i) The applicant's claim is statute barred under s. 2(a) of PAPA;

C (ii) The applicant's claim falls under the first limb of s. 2(a) PAPA;

(iii) The period of limitation under s. 2(a) PAPA is absolute and mandatory; and

(iv) The applicant's claim is obviously unsustainable.

D **Issue Before This Court**

[6] At the outset, it is the finding of this court that the four grounds enumerated in the respondents' application above are, in actual fact, rested in only one main issue that forms the substantive ground of the respondent's application to be considered by the court – was the applicant's OS statute E barred under s. 2(a) of PAPA? If the answer is in the affirmative, this court will then be moved to favourably consider and allow the respondents' application in finding the OS to be unsustainable and must be struck out pursuant to O. 18 r. 19(1)(b) and (d) of the ROC. If the answer to that question is in the negative, the reverse must be ordered by this court.

F **Out Of Time?**

[7] Before I deal with the substantive issue, it is prudent that at this juncture I deal with the third ground canvassed by the respondents in supporting their application, that the period of limitation under s. 2(a) of G PAPA is mandatory.

[8] For ease of reference, the said s. 2(a) is reproduced as below:

> 2. Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended H execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect:
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after I the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;

[9] That the time period mentioned in s. 2(a) PAPA is absolute and shall be complied with mandatorily is never disputed. This was not even disputed by the applicant in its affidavit or in the written or oral submissions of the counsel for the applicant. The elucidation of this position was also correctly pointed out by the counsel for the respondents in the authorities cited in the learned counsel's written submissions, namely *Tasja Sdn Bhd v. Golden Approach Sdn Bhd* [2011] 3 CLJ 751; *Selvaraju Ponniah v. Suruhanjaya Perkhidmatan Awam Malaysia & Anor* [2007] 6 CLJ 245; [2007] 7 MLJ 1; *Alias Ismail v. Hairuddin Mohamad & Anor* [1997] 4 CLJ 669, *Credit Corp (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69. But this court agrees with the respondents' counsel's arguments up to this point only.

[10] The absoluteness and mandatoriness of that s. 2(a) PAPA is one thing. To prove that the applicant had legally breached that absolute and mandatory requirement is another thing altogether. I shall now turn to this very issue.

[11] The respondents argued that the cause of action alleged by the applicant arose on 8 January 2014, the date when the first respondent issued to the applicant the notice of seizure pursuant to s. 114 of the Customs Act 1967.

[12] Applying s. 2(a) of PAPA, the respondents argued that the applicant's OS shall be filed within 36 months from 8 January 2014, the last date being 7 January 2017. The applicant filed the OS on 2 January 2018. If the date 8 January 2014 is taken as the date when the 36 months provided under s. 2(a) PAPA begins to run, then this court calculated the delay as 11 months 25 days (8 January 2017 – 2 January 2018). The respondents, however, calculated the delay as 47 months and 25 days, computing it from 8 July 2014 – 2 January 2018.

[13] Consequentially, argued the respondents, the OS must be struck out pursuant to O. 18 r. 19(1)(b) and (d) of the ROC 2012.

[14] The applicant argued that it had diligently fulfilled its part by communicating in writing with the respondents on numerous occasions, particularly *vide* its letters dated 14 April 2014; 20 May 2016; 25 May 2016; 1 September 2016; 10 October 2017 but without any reply from the respondents.

[15] It is the applicant's contention that the 36-month period for the applicant to file its action against the respondents shall be calculated commencing from the date when the applicant made its final attempt with the respondents, namely its letter dated 10 October 2017, and not the date of the notice of seizure. Thus, the 36 months would lapse on 9 October 2020. And as its OS filed on 2 January 2018, it was way within the time permitted under s. 2(a) PAPA.

[16] I must briefly state the contents of those letters sent by the applicant to the respondents. But before I do that, I must highlight the contents of the two notice of seizure and notice of forfeiture.

[17] The notice of seizure contained the following key information:

(i) There was a portion on the above part of the notice stating "AR Berdaftar/Serahan Kendiri";

(ii) The said notice was issued pursuant to s. 114 of the Customs Act 1967;

(iii) The first respondent seized the car on 8 January 2014 at 1930 for its infringement of s. 66(2) of the Customs Act;

(iv) Although the seizure date was 8 January 2014, the date of this notice of seizure was 3 April 2014, yes, 3 April 2014;

(v) Pursuant to s. 126 of the Customs Act, if the Applicant fail to claim the car within one month from the date it was seized, the car will be forfeited pursuant to s. 128(3) of the Customs Act;

(vi) Notice was given to the applicant to make a written claim on the seized car within one month from the date of seizure.

[18] The notice of forfeiture, on the other hand, was an undated notice. It was signed by the first respondent, informing that the said car will be forfeited if there is no prosecution proceeded and if the applicant does not claim within one month from the date of seizure.

[19] Section 102 of the Customs Act provides that any notices to be served on any person under that Act shall be served either personally or by registered post, hence the said portion on the above part of the notice issued to the applicant. As the first respondent failed to delete the relevant portion in the notice of seizure, this court cannot conclusively make a finding whether that notice was served personally or *via* AR Registered to the applicant. Notwithstanding this finding, I ruled at this juncture that this is not fatal to the respondents' case *vis-a-vis* this application in light of the admission in the applicant's letter dated 14 April 2014 that it had received that notice.

[20] However, the counsel for the respondents did not answer this court's question during the hearing of encl. 6 as to why was the notice of seizure dated 3 April 2014 although the seizure of the car was carried out on 8 January 2014. The learned counsel also did not furnish this court with any explanation as to why the notice of forfeiture was left undated. This court cannot fathom as to how could the appellant be expected to respond within one month from the date of the seizure (8 January 2014) when the notice of that seizure was only issued almost three months after the seizure.

[21] This court is fully appraised of the fact that it would and could only deal with these issues substantively during the actual trial of the applicant's OS, should the respondents' application to strike out the OS be dismissed.

[22] This court is fully conscious that in determining an application under O. 18 r. 19(1) ROC, I cannot deal with the merit of the substantive claim or attempt to resolve the conflicts of evidence in striking out proceedings (See: *Meeriam Rosaline Edward Paul & Ors v. William Singam Raja Singam* [2010] 1 LNS 2032; [2010] 3 MLJ 541 and *Noor Jahan Abdul Wahab v. Md Yusoff Amanshah & Anor* [1994] 2 CLJ 249; [1994] 1 MLJ 156).

[23] Nonetheless, this court is entitled to look at the history of the case to determine if there is an action (see: *Jamir Hassan Najir Hassan v. Kang Min* [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773; [1992] 2 MLJ 46) and to determine whether it can clearly be seen that the claim or answer is on the face of it "obviously unsustainable" (see: *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36; and *Hi-Summit Construction Sdn Bhd v. Konsortium Lapangan Terjaya Sdn Bhd & Ors* [2014] 1 LNS 999; [2015] 2 MLJ 247).

[24] I had perused the communications from the applicant to the respondents, the synopsis of which are as follows:

(i) Letter dated 14 April 2014: this letter was sent by the applicant to the first respondent informing that the applicant had only realised that the said car was seized by the first respondent upon making stock checks and upon receiving the notice of seizure in April, about three months after the seizure took place. The applicant demanded for the car to be returned to it as the rightful owner.

(ii) Letter dated 20 May 2016: this was the applicant's letter addressed to the Royal Malaysian Customs' Headquarters in Putrajaya referring to a letter from the customs dated 12 May 2016. Through this letter, the applicant requested that it be allowed exemption from payment of duties as it cannot sell the said car. The applicant further informed that it is willing to pay the compound of RM5,000.

(iii) Letter dated 25 May 2016: this was the applicant's letter addressed to one Mr Idros Mokhtar, a Customs Officer at the Customs Enforcement Branch, Teluk Intan, Perak, who issued the "Notis Tuntutan Duti Cukai Serta Tawaran Kompaun" dated 12 May 2016. By this letter, the applicant requested for a postponement of 60 days to pay the compound as it had applied for exemption from the payment of duties.

(iv) Letter dated 1 September 2016: this was the applicant's letter addressed to the Royal Malaysian Customs' Headquarters, reiterating its letter of 20 May 2016, requesting that the applicant be allowed exemption from payment of duties as it cannot sell the car. The applicant further informed that it will pay the compound of RM5,000. The applicant further informed that it intends to re-export the said car to the United Kingdom.

(v) Letter dated 10 October 2017: this letter was issued by the applicant's solicitor and addressed to the second respondent. Through this letter, the applicant's solicitor informed of the applicant's attempts to resolve the issue with the Royal Malaysian Customs by enumerating the letters above. This letter also informed of the applicant's proposal for a "win-win" solution to the issue. At the same time, the applicant reiterated its request for the return of the said car.

[25] Having perused the communications from the applicant to the respondents as enumerated above, I found the applicant's contention bears merit. I rule that the applicant's cause of action against the respondent begins on 10 October 2017. As such, it is my ruling that the OS was filed within the time provided in s. 2(a) of PAPA.

[26] The principles governing O. 18 r. 19 (1) application have been set out in a long line of authorities, which include the oft-quoted *Sarjit Singh Khaira v. Government of The State of Sarawak & Anor.* [1990] 2 CLJ 95, 97; [1990] 3 CLJ (Rep) 59 and *Bandar Builder Sdn. Bhd. & 2 Ors. v. United Malayan Banking Corporation Bhd.* [1993] 4 CLJ 7. In a nutshell, the gist of the decisions is that where a claim or pleading is shown to be obviously unsustainable, any limb of O. 18 r. 19(1) may be invoked to strike out that unsustainable claim.

[27] It is settled law that recourse to this summary process can only be adopted when it can clearly be seen that the claim is on the face of it obviously unsustainable. The summary power should be exercised in plain and obvious cases only and where the claim on the face of it is obviously bound to fail (*Enersafe Sdn Bhd v. Megarina Sdn Bhd* [2006] 2 CLJ 1021). This proposition is clearly explained in the Federal Court's case of *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673; [2013] 5 MLJ 1 at p. 698 (CLJ); p. 18 (MLJ) as follows:

> ... We also make this observation on the application of the court's summary power to strike out a pleading under Order 18 r. 19 of the Rules of Court 2012 (successor to RHC 1980). Although the power to strike out is a wide discretion, it should be exercised with care and only when the threshold requirement of 'an obvious and unsustainable case', can a pleading be struck out.

[28] In essence, this court will only dismiss and strike out an action pursuant to O. 18 r. 19:

(i) in plain and obvious cases;

(ii) where there is no reasonable cause of action;

(iii) to avoid unnecessary trial which had no prospect of success;

(iv) where the action is obviously unsustainable; or

(v) where the pleadings are entirely hopeless, baseless or without foundation in law or in equity.

(See: *Duta Arif Sdn Bhd & Ors v. Charterfield Development Corporation Sdn Bhd & Ors* [2007] 1 LNS 415; [2008] 6 MLJ 139; *Alliance Investment Bank Sdn Bhd v. Good Quantum Sdn Bhd & Ors* [2011] 4 CLJ 861; [2010] MLJU 1679; *Nescajaya Sdn Bhd v. Suairah Parigula & Ors* [2011] 1 LNS 527; [2011] 9 MLJ 774; *Cepatwawasan Group Bhd & Anor v. Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors* [2008] 2 CLJ 620; [2008] 2 MLJ 915; *Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd* [2011] 1 CLJ 285; [2011] 2 MLJ 192; *Wesma Rubber Products v. CIMB Bank Berhad* [2014] 1 LNS 479).

Order 18 r. 19 (1)(b): Scandalous, Frivolous Or Vexatious

[29] "Scandalous" was decided to mean wholly unnecessary and irrelevant, not just unpleasant allegations: *Boey Oi Leng v. Trans Resources Corporation Sdn Bhd* [2002] 1 CLJ 405; [2001] 4 AMR 4807; *Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd (supra)*; *Godrej Sara Lee Ltd v. Siah Teong Teck & Anor (No 1)* [2007] 1 LNS 228; [2007] 7 MLJ 153; *Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor* [2008] 1 CLJ 651; [2008] 1 MLJ 11; *Sivakumar Varatharaju Naidu v. Ganesan Retanam* [2010] 9 CLJ 825; [2011] 6 MLJ 70.

[30] The following illustrations had been decided to come within the meaning of the term "frivolous or vexatious":

(i) No *locus standi*: *AIC Dotcom Sdn Bhd v. MTEX Corp Sdn Bhd & Ors* [2003] 7 CLJ 149; [2003] 4 MLJ 324; *Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd* [2012] 10 CLJ 88; [2013] 1 MLJ 406;

(ii) *Res Judicata: Abdul Hamid Rahmat & Anor v. Development & Commercial Bank Bhd & Anor* [1993] 1 CLJ 35; [1993] 1 MLJ 306; *Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan UMNO Negeri Pahang Darul Makmur* [2009] 1 LNS 1457; [2010] 8 MLJ 57; *Datuk Ooi Han Eng v. Soh Huah Siah* [2010] 1 LNS 343; [2010] 5 MLJ 665;

(iii) Wrong party is sued: See *Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah* [1979] 1 LNS 130; [1979] 2 MLJ 240;

(iv) Illegality: *Lim Eng Heng v. Lim Sam Keow & Ors* [2003] 6 CLJ 1; [2003] MLJU 47;

(v) Unfounded claims: *EON Bank Bhd v. Cepad Group Sdn Bhd & Ors (No 2)* [2006] 1 LNS 246; [2006] 4 MLJ 362; or

(vi) Claim is statute-barred: *Sim Kiang Chiok v. Southeast Asia Special Asset Management Bhd* [2015] 9 CLJ 344; [2016] 1 MLJ 57.

[31] Applying the principle enumerated above, this court does not find that the applicant's OS to fall under any of the illustrations enumerated above for it to be scandalous, frivolous or vexatious. The respondents' claim under O. 18 r. 19(1)(b), therefore, failed.

A **Order 18 r. 19(1)(d): Abuse Of The Process Of The Court**

[32] The Court of Appeal in *Harapan Permai (supra)* held that where the process of court had not been used in a *bona fide* manner, it tantamount to an abuse of the process of the court.

B **[33]** Some illustrations decided by the courts to fall within the meaning of the phrase "abuse of the court process" are:

(i) Plaintiff failed to name the tortfeasors, and the second defendant was wrongly named: *Zaina Abidin Hamid & Ors v. Kerajaan Malaysia & Ors* [2009] 6 CLJ 683; [2009] 6 MLJ 863; *Public Finance Bhd v. S Ramasamy*
C *KMS Chockalingam Chettiar* [1990] 2 CLJ 431; [1990] 2 CLJ (Rep) 664.

(ii) Parties have submitted themselves to the jurisdiction of the Syariah Court and seek to complain on the same matter in the High Court: *Mohd Habibullah Mahmood v. Faridah Dato' Talib* [1993] 1 CLJ 264; [1992] 2 MLJ 793;

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(iii) An action to recover a debt is taken simultaneously with a foreclosure action in respect of the same debt: *Ng Yik Seng & Anor v. Perwira Habib Bank Malaysia Bhd* [1980] 1 LNS 52; [1980] 2 MLJ 83;

(iv) Re-agitating the same matter that had been finally adjudicated by the
E Federal Court and the Court of Appeal: *Farlim Properties Sdn Bhd v. Goh Keat Poh & Ors & Other Appeals* [2003] 4 CLJ 505; [2002] 6 MLJ 171.

[34] Having perused the affidavits and the OS, and going by the numerous illustrations and examples laid down by the authorities cited earlier on what constitutes an abuse of the court process, this court failed to find the existence
F of an iota of abuse of the process of the court in the applicant's action. Thus, the respondent's reliance under this paragraph must also fail.

[35] This court will always abide by the reminder of the Court of Appeal in *See Thong & Anor v. Saw Beng Chong* [2012] 1 LNS 817; [2013] 3 MLJ 235 which was in the following term:

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> the power to strike a case under the order without having to go for trial should be exercised sparingly and only in a plain and obvious case. The procedure is of a summary nature. The party affected should not be deprived of his right to have his case proceeded by a proper trial unless the claim is obviously unsustainable. The Federal Court in the case of
> H *C C Ng & Brothers Sdn Bhd v. Government of The State of Pahang* [1985] CLJ Rep 45; [1985] 1 CLJ 235; [1985] 1 MLJ 347, had said that 'the inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with utmost caution. It is a power which ought to be very sparingly exercised and only in very exceptional cases.

I

Conclusion

[36] I cannot find at this juncture that the applicant's OS discloses no reasonable cause of action. Neither did I find that the OS is scandalous, frivolous or vexatious, nor an abuse of the process of the court.

[37] Instead, this court has found that the respondents' claims under O. 18 r. 19(1)(b) and (d) of the Rules of Court 2012 to strike out the plaintiffs' OS fail to stand in law.

[38] The respondents' application in encl. 6 is dismissed with no order as to costs.